

EXEMPTIONS

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Recovery of a money judgment signifies the end of one important procedure and the beginning of another. It is the final determination of the merits of the plaintiff's claim, and, at the same time, his authorization to begin the enforcement or collection process. This process has, as its ultimate objective, an appropriation of so much of the debtor's property as may be required to satisfy the judgment against him. At common law, there were no limitations upon creditors in the exercise of the enforcement process, and all of a debtor's wealth that was amenable to legal or equitable process could be taken in satisfaction of his just debts.¹ Today however, by virtue of the exemption statutes, certain property belonging to a debtor may be immune from the claims of creditors. These statutes confer upon a debtor the right to hold property of a particular class and to a certain value free from seizure and sale under legal or equitable process for the payment of his debts. From the creditor's standpoint, the exemption laws are of great importance to the extent that they affect the debtor's collectibility, and thus the ultimate value of any money judgment recovered against him. Before commencing any extended or expensive litigation, the prudent creditor will therefore determine what non-exempt property of the debtor's may be available for payment of his judgment when it is rendered. While the importance of the exemption statutes to the debtor is obvious, it is necessary that he too have some understanding of the nature of the rights granted him, since these may be irretrievably lost if not seasonably and properly exercised.

Since exemptions exist solely by virtue of legislative enactment, the appropriate statutes must be examined to determine their effect upon the enforcement process. The principal exemptions of property from execution, attachment and other process in Ohio are found in OHIO REV. CODE, §§2329.62 through 2329.83. These relate to the exemption of specific chattel property, the homestead exemption, and the exemption in lieu of homestead. In addition to these three general exemptions, there are many specific types of property which are exempted from creditor's claims by special statutory provisions. Included in this category are policies of life insurance,² police,³ and firemen's pensions,⁴ workmen's compensation awards,⁵ and many others. Because of the limited application of most of these special provisions, only the exemptions relating

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¹ 18 O. JUR. 824, EXEMPTIONS, §2.

² OHIO REV. CODE §3911.10 et seq. (9394).

³ OHIO REV. CODE §741.47 (4628-2).

⁴ OHIO REV. CODE §741.16 (4612-2).

⁵ OHIO REV. CODE §4123.67 (1465-88).

to insurance will be included in the following discussion. With this exception, the scope of the present article will be confined to the three general types of exemption.

I. PRINCIPLES COMMON TO ALL EXEMPTIONS

The exemption statutes are based upon a well established and enlightened public policy which seeks to protect the family of a debtor against the deprivation of a home and of those household facilities which make the family relation possible.⁶ This protection has been extended also to the instrumentalities by means of which the debtor earns his living so that he may be able to provide the necessities of life for himself and his dependents.⁷ Indirectly, the benefits of the exemption statutes accrue to the public as well which might otherwise be burdened by the support of the destitute family. While designed for the protection of the improvident debtor, the exemption laws do not relieve a person of the legal responsibility for the payment of his just debts. The right to an exemption is not a defense to an action for recovery of money, but rather is in the nature of a stay of the proceedings to collect a claim out of particular property. It has been characterized as a personal privilege which must be exercised affirmatively to be enjoyed.⁸ Being a personal privilege, it cannot be transferred or assigned by the debtor.⁹

Ordinarily, the exemption statutes would receive a strict construction since they are in derogation of the common law.¹⁰ However, in order to effectuate the humane and beneficent purposes for which they are enacted, it is uniformly accepted that such statutes should be liberally construed in favor of the debtor.¹¹ As a corollary, a statutory provision in the nature of an exception to the general law of exemptions should be given a strict interpretation.¹² In accordance with this rule of construction, all reasonable doubts as to the applicability of the statute to a particular situation should be resolved so as to promote its purpose. However, the liberal interpretation of exemption statutes should, in every case, be consistent with the usual rules of statutory construction. It should not be the basis for conferring benefits and privileges not contemplated by the legislature by expanding the classes of property or the groups of persons coming within the purview of the statute.

Exemption statutes are generally considered to be remedial and thus part of the procedural rather than the substantive law of a state.¹³

⁶ *Williams v. Donough*, 65 Ohio St. 499, 63 N.E. 84 (1902); *Dennis v. Smith*, 125 Ohio St. 120, 180 N.E. 638 (1932).

⁷ *Cleveland Arcade Co. v. Talcott*, 22 Ohio App. 516, 154 N.E. 62 (1926).

⁸ *Conley v. Chilcote*, 25 Ohio St. 320 (1874).

⁹ *Ibid.*

¹⁰ *Dombrowsky v. Savinsky*, 16 Ohio L. Abs. 114 (1933).

¹¹ *Dennis v. Smith*, 125 Ohio St. 120, 180 N.E. 638 (1932); *Ezra v. Sutton*, 16 Ohio L. Abs. 669 (1934); *Kleinman v. Brown*, 30 Ohio N.P. (N.S.) 69 (1932); *Janasik v. Thomas*, 28 Ohio N.P. (N.S.) 616 (1927).

¹² *Troutman v. Eichar*, 64 Ohio App. 415, 28 N.E. 2d 953 (1940).

¹³ 35 C. J. S., EXEMPTIONS 8.

For this reason, they are rarely enforced outside the jurisdiction of the state which enacts them. Accordingly, in determining questions of exemptions between non-residents in an attachment action brought in Ohio, an Ohio court properly applied Ohio law.¹⁴ However, where money due under a contract between residents of Michigan was exempt by Michigan law, an Ohio court of appeals applied the exemption laws of the foreign state in denying recovery in a garnishment action brought by a judgment creditor of one of the contracting parties.¹⁵ The court held that the contract having been made in Michigan to be performed there should be interpreted in accordance with the statutes of that state which, in this case, applied as part of its substantive law.

It is generally understood that the right to exemptions under the Ohio statute is limited to individual debtors. Thus, a partnership cannot claim exemptions in any of the property belonging to the firm.¹⁶ The individual debtor, however, may assert his exemption rights in any court in Ohio, including justice of the peace and mayor's courts, and in any type of proceeding pending before any officer whereby the debtor's property is to be seized or applied in payment of his debts.¹⁷

The principles considered thus far apply with equal importance to all of the general exemptions from execution and attachment. With this common background in mind, let us examine the particular application of each of the exemption provisions.

II. EXEMPTIONS OF PERSONAL PROPERTY

A. Persons Entitled to Exemptions of Personal Property

1. Single persons. OHIO REV. CODE §2329.62 (11721) provides certain limited exemptions of personal property to unmarried persons. The legislature, having regard for the needs of those who must support only themselves, has confined the exemption to a limited amount of the debtor's wearing apparel, personal earnings and tools of trade. The privilege is further restricted by the statute to residents of Ohio.

2. Persons supporting others. More liberal exemptions are granted by OHIO REV. CODE §2329.66 (11725) to persons who have the responsibility of supporting others in addition to themselves. The benefits of this provision are extended to (a) those who are the chief support of a family, (b) persons paying alimony, maintenance, or other allowance for the support of a divorced or separated spouse or for the support of a minor child, (c) persons who are the chief support of any dependent person, (d) and to widows. This provision is considerably more extensive in scope than the former statute which required that a debtor be the head and sole support of a family and reside with them in order to

¹⁴ *Jacoby Bros. v. Dotson*, 5 Ohio N.P. 282 (1907).

¹⁵ *Fulton v. Heinrich*, 48 Ohio App. 455 (1934).

¹⁶ *Aultman, et al. v. Wilson*, 55 Ohio St. 138 (1896).

¹⁷ OHIO REV. CODE §2329.69 (11728). See also OHIO REV. CODE §1313.17 (11111), which preserves exemptions in Assignments for Benefit of Creditors.

qualify for the exemption benefits. The present enactment is more realistic in its application and is properly keyed to the responsibility of the debtor to contribute to the support of other persons. While there is no statutory directive to this effect, it is clear that only those who are required by law to support such other persons come within the protected class of the statute.¹⁸ Thus, a debtor contributing to the support of a person who is not legally dependent upon him would not be entitled to the exemption. Consistent with the policy of providing more liberal treatment to debtors within this group, this exemption is not limited to residents of Ohio as is the exemption granted to unmarried debtors.

A separate statutory provision gives to married women the benefits of all exemptions allowed to the "head of a family."¹⁹ Although OHIO REV. CODE §2329.66 (11725) no longer speaks in terms of head of a family, there is no question that the property exempt under this section is also exempt to married women.

This is the extent to which the statute attempts to define the classes of persons who may avail themselves of the exemptions of specific personal property. Further classifications may be developed, however, by the types of property designated by the statute as exempt.

B. Personal Property Exempt

1. Wearing Apparel and Household Furnishings. Only the property specifically described in the statute is exempt from execution, attachment, and sale. If a particular chattel does not come within one of the enumerated classes of property, it cannot otherwise achieve this protected status. Most of the property to which the exemption refers is that which is personal to the debtor and not readily salable.

The wearing apparel of all judgment debtors is exempt from seizure under the statute.²⁰ There is no limit upon the value of the clothing which can be claimed by those who are the chief support of a family, but unmarried debtors may hold such property exempt only to a value of \$100. To be exempt, the property must constitute wearing apparel within the usual and ordinary meaning of the term.²¹ Undoubtedly, it would include clothing and dress of all kinds actually used by the debtor for his comfort and convenience. To what extent the term includes ornamental jewelry is not so clear. From the cases, however, it seems likely that jewelry habitually worn or used by a debtor, such as a watch, will be exempt as long as its value does not outweigh the purpose for which it is worn or used.²²

Household furnishings not exceeding \$150 in value may also be

¹⁸ Re Hess, 21 Ohio Op. 110 (1941).

¹⁹ OHIO REV. CODE §2323.09 (11591).

²⁰ OHIO REV. CODE §§2329.62 (A) (11721) and 2329.66 (A) (11725).

²¹ 18 O. JUR., EXEMPTIONS 846.

²² Beckett v. Wishon, 5 Ohio N.P. 155 (1907); Re Henry, 14 Ohio F.D. 353 (1905).

selected as exempt by debtors who are the chief support of a family.²³ This privilege, however, is not extended to unmarried debtors. Applying the accepted standard of liberal construction to this provision indicates that the term "household furnishings", as used in the statute, should include all objects in the home intended or used for the comfort or convenience of the family.²⁴ However, the property included in this category must bear some relation to the object of the exemption laws which is to provide the necessities of life to the debtor and his family.

Certain other kinds of property actually designed and provided for the use of the debtor or his family may be held exempt by those who are the chief support of a family. These are described by the statute, and include the beds and bedding, cooking stove, heating stove, and enough fuel for 60 days, belonging to the debtor or his family and intended for use by them.²⁵ Provisions, including groceries, provided for the use of the debtor or his family to a value of \$50, all family books and pictures, and all articles, specimens, and cabinets of natural history or science which are not kept for exhibition or pecuniary gain are also included within the exempt group of property.²⁶

2. Tools and Implements of Trade. The tools and implements of a debtor for carrying on his profession, trade or business, including agriculture, and not exceeding \$200 in value, may be claimed exempt both by unmarried debtors and those who are the chief support of a family.²⁷ Oddly enough, the exemption allowed the latter group is limited to necessary tools and implements, while this restriction is not found in the statutory language granting the exemption to unmarried debtors. In view of the avowed policy of the legislature to deal more liberally with those persons who have greater obligations of support, there would seem to be no logical reason for this distinction. It has been held under the more restricted provision that a lawyer's library is a necessary tool or implement for the conduct of his profession.²⁸

The question of whether an automobile may be exempt as a necessary tool or implement of trade has not been so easily resolved. It has been held that because the identity of an automobile as exempt property would vary in each case with the circumstances of its use, this form of property, although used exclusively by a debtor in his profession, cannot be regarded as an essential for the carrying on of a business, trade or profession.²⁹ This reasoning has been rejected in later cases which have ruled that an automobile may constitute an implement necessary for carrying on a debtor's trade or business, and if it qualifies as such will be

²³ OHIO REV. CODE §2329.66 (B) (11725).

²⁴ 18 O. JUR., EXEMPTIONS 847.

²⁵ OHIO REV. CODE §2329.66 (A) (11725).

²⁶ OHIO REV. CODE §2329.66 (D), (C) and (G) (11725).

²⁷ OHIO REV. CODE §§2329.62 (B) (11721) and 2329.66 (E) (11725).

²⁸ *Cleveland Arcade Co. v. Talcott*, 22 Ohio App. 516, 154 N.E. 62 (1926).

²⁹ *Gordon v. Brewer*, 32 Ohio App. 199, 166 N.E. 915 (1929).

set off as exempt property under this provision.³⁰ Because of the limitation as to value, this exemption, as it applies to automobiles, is of little importance in today's economy.

3. *Personal Earnings.* The protection of the exemption statutes extends to a portion of the personal earnings of a debtor, but only for services rendered by him within thirty days before the issuing of an attachment or other process, the rendition of a judgment, or the making of an order seeking to subject such earnings to the payment of a debt or other obligation. Unmarried debtors may retain up to \$30 of such earnings free of the demands of creditors.³¹ Those who are the chief support of a family, or who otherwise qualify under that provision, are entitled for their exemptions to 80% of the first \$200 and 60% of the balance of such earnings, but in no event less than \$60.³² The limitation as to the percentage of personal earnings which may be taken by proceedings in aid of execution within a thirty day period means that only one creditor can attach the non-exempt portion of the debtor's earnings during each thirty day period.³³ This prevents the taking by creditors of more than the amount allowed by statute.

The exemption of earnings applies unconditionally and uniformly to all types of claims. Preference is no longer given, as it was under earlier statutes, to claims for work and labor or for necessities purchased by the debtor. Furthermore, the privilege is not limited to wages for manual labor, but applies to compensation for personal services of any kind. Accordingly, earnings due a county commissioner for his services come within the purview of the exemption.³⁴ But money due a subcontractor under a construction contract is not exempt even though labor and materials are expended in the performance of the work, since the services are rendered in this connection as an independent contractor rather than as one working for wages.³⁵

4. *Insurance.* All policies of insurance and endowment or annuity contracts on the life of a debtor taken out for the benefit of or made payable, by change of beneficiary, transfer, or assignment, to his wife, children, dependent relative, creditor, or to a trustee for the benefit of any of them, are exempt from the claims of the insured's creditors.³⁶ The proceeds of such policies or contracts, which include their cash surrender value, interest, and accumulated dividends, are also exempt under this provision, but only until the death of the insured.³⁷ When the policy

³⁰ *Mick v. Coey*, 21 Ohio L. Abs. 646 (1936); *Janasik v. Thomas*, 28 Ohio N.P. (N.S.) 616 (1927).

³¹ OHIO REV. CODE §2329.62 (C) (11721).

³² OHIO REV. CODE §2329.66 (F) (11725).

³³ *Kleinman v. Brown*, 30 Ohio N.P. (N.S.) 69 (1932).

³⁴ *Fitzgibbon v. DeChant*, 58 Ohio App. 453 (1938).

³⁵ *Garretson Lumber Co. v. Ziemke*, 11 Ohio L. Abs. 273 (1931).

³⁶ OHIO REV. CODE §3911.10 (9394).

³⁷ *Doethlaff v. Penn Mut. Life Ins. Co.*, 117 F. 2d 582 (1941).

matures and the proceeds are paid to the beneficiary, this protection ceases, and the funds are no longer exempt under this provision as insurance or proceeds.

Insurance policies and proceeds are exempt only as long as the beneficiary is one of the class named in the statute.³⁸ The insured may retain the right to change the beneficiary, however, without affecting the right to the exemption.³⁹ If this power is exercised and the beneficiary changed to a person not within the protected class, or if the relationship between the insured and the beneficiary should change, the policy loses its exempt quality.⁴⁰ Whether a policy is exempt depends upon its status at the time of seizure and not at the time the policy was issued.⁴¹ Thus, when an exempt policy is surrendered to an insurance company as part of the settlement of a disputed claim, the settlement proceeds in the hands of the insurer are no longer exempt.⁴²

The statute provides, however, that creditors may recover from the proceeds of such insurance policies or endowment or annuity contracts the premiums paid by the insured in fraud of creditors.⁴³ Fraud, as used in this connection, has been construed to include constructive fraud, and was inferred where an insolvent debtor diverted his assets to the payment of insurance premiums, although no actual intent to defraud creditors was shown.⁴⁴ The right of creditors to recover out of insurance proceeds the premiums so paid is postponed until the maturity of the policy. This deferment does not prevent the statute of limitation from running against the creditor's claim, and the claim must still be enforceable at the time the policy matures. Furthermore, the action to recover the premiums must be brought within the time prescribed by the statute of limitations relating to fraud.

The proceeds of an insurance policy taken out by a wife on her husband's life are also exempt from the claims of the husband's representatives or creditors.⁴⁵ The same preferred status is accorded policies of insurance upon the life of any person which have been assigned to or made payable to a married woman, whether such transfer is made by her husband or by another person.⁴⁶ The statute also provides that the proceeds of any life insurance policy, or endowment or annuity contract may be exempt from the claims of the beneficiaries' creditors as well, if the policy or contract so provides.⁴⁷

³⁸ *Baxter v. Old National-City Bank*, 46 Ohio App. 533, 189 N.E. 514 (1933).

³⁹ *Ibid.*

⁴⁰ *Hoffman v. Weiland*, 64 Ohio App. 467, 29 N.E. 2d 33 (1940).

⁴¹ *Re Hess*, 21, Ohio Op. 110 (1941).

⁴² *Baxter v. Old National-City Bank*, 46 Ohio App. 533, 189 N.E. 514 (1933).

⁴³ OHIO REV. CODE §3911.10 (9394).

⁴⁴ *John Weenick & Sons v. Blahd*, 73 Ohio App. 67, 54 N.E. 2d 426 (1943);
cf. *Doethlaff v. Penn Mut. Life Ins. Co.*, 117 F. 2d 582 (1941).

⁴⁵ OHIO REV. CODE §3911.11 (9397).

⁴⁶ OHIO REV. CODE §3911.12 (9398).

⁴⁷ OHIO REV. CODE §3911.14 (9398-1).

A beneficiary fund, not exceeding \$5000, set apart, appropriated, or paid by a benevolent association or society to the family of a deceased member is not liable for the payment of any of the debts of the deceased.⁴⁸ The proceeds of a fire insurance policy covering exempt property is also exempt, as the funds stand in the place of the exempt property.⁴⁹

C. Claims Not Subject to Exemptions of Personal Property

A separate statutory provision excludes certain types of claims from the effect of the homestead exemption and exemption in lieu of homestead, but not from the exemptions of specific personal property.⁵⁰ There is a further exception set out in the statute relating to the exemption in lieu of homestead which provides that no personal property shall be exempt from execution on a judgment rendered for the purchase price or a part thereof.⁵¹ This limitation has been held to apply also to the personal property exempt under OHIO REV. CODE §§2329.62 (11721) and 2329.66 (11725). Thus, a cook stove, ordinarily exempt under the latter section, cannot be held by a debtor free from a judgment recovered against him for its purchase price.⁵²

The fact that personal property is exempt does not prevent its encumbrance; but giving a lien on such property operates as a waiver of the right to claim it as exempt.⁵³ Thus, exempt household furnishings which have been mortgaged cannot be held exempt in an action to enforce the mortgage by foreclosure.⁵⁴ The statute dealing with mechanic's liens contains a provision expressly prohibiting exemptions in property subject to such liens.⁵⁵ Exemptions may not be claimed against a judgment for taxes.⁵⁶

The courts have had some difficulty with the question of whether a judgment for alimony is enforceable against exempt property. The prevailing view in Ohio is that exemptions can be claimed against a judgment for alimony, since the statute does not expressly except such claims from the operation of the exemption laws.⁵⁷ Enforcement of a judgment for alimony has been permitted, however, against a workmen's compensation award which is exempt from claims of creditors under the Workmen's Compensation Act, on the grounds that alimony is not a debt within the meaning of that Act, but an obligation imposed by law because of public policy.⁵⁸

⁴⁸ OHIO REV. CODE §2329.63 (11722).

⁴⁹ *Dennis v. Smith*, 125 Ohio St. 120, 180 N.E. 638 (1932).

⁵⁰ OHIO REV. CODE §2329.72 (11729).

⁵¹ OHIO REV. CODE §2329.81 (11738).

⁵² *State v. Arnold*, 3 Ohio L. Abs. 36 (1925).

⁵³ *Ohio Loan Co. v. Kletecka*, 47 Ohio App. 514, 192 N.E. 182 (1934); *Ridenour v. Scott*, 39 Ohio App. 529, 177 N.E. 926 (1931).

⁵⁴ *Ohio Loan Co. v. Kletecka*, *supra*, note 53.

⁵⁵ OHIO REV. CODE §1311.34 (8339).

⁵⁶ OHIO REV. CODE §5719.08 (5697 & 5698).

⁵⁷ *Sweigart v. Sweigart*, 33 Ohio L. Abs. 250 (1940).

⁵⁸ *Chapman v. Chapman*, 29 Ohio Op. 273 (1944).

D. Establishment and Loss of Right

As previously indicated, the right to an exemption is merely a personal privilege, and must be asserted affirmatively by the debtor. The privilege may be exercised by making a demand for the exemptions upon the officer serving the execution,⁵⁹ or by motion directed to the court which issued the order under which the property is being taken.⁶⁰ The demand need not be in any particular form and any language that clearly informs the officer of the claim will suffice. Since most of the exemptions of specific personal property depend upon their selection by the debtor, a mere demand without notifying the officer of the particular property claimed exempt is not sufficient. If the debtor fails to choose the property to be exempt, the officer is authorized to proceed with its sale.⁶¹ Both the demand and selection must be made before a sale of the property under the order or process,⁶² or in the case of an attachment, before the property is actually applied to the payment of the debt.⁶³

The right to an exemption can be waived. If the debtor fails to exercise the right by making a proper and timely demand and selection, the exemption will be deemed to have been waived.⁶⁴ The right may also be waived by the sale, transfer or encumbrance of the property subject to the exemption.⁶⁵ Although a debtor may waive the exemption right, he may not do so by executory contract. The statute provides that every promise, agreement or contract made or entered into whereby the exemption laws of Ohio are sought to be waived are to that extent void.⁶⁶ The purpose of this provision, which is merely a codification of earlier case law, is to safeguard for the debtor the protection afforded by the exemption laws. This provision is limited, however, to executory agreements to waive exemptions and does not affect executed waivers.

III. HOMESTEAD EXEMPTION

In addition to the exemptions discussed in the preceding section, the statute permits certain debtors to hold real estate occupied by them as a homestead free from the claims of creditors.⁶⁷ Unlike the exemption of personal property in which the debtor acquires absolute ownership with full power of disposition, the debtor acquires no protected legal title to property set off as a homestead.⁶⁸ The statute does not affect the ownership of the property but merely exempts it from sale for the payment of debts. The exemption, then, is a mere possessory right to use and occupy

⁵⁹ *Regan v. Zeeb*, 28 Ohio St. 483 (1876).

⁶⁰ *Kirk v. Stevenson*, 59 Ohio St. 556, 53 N.E. 49 (1899).

⁶¹ *Rempe v. Ravens*, 68 Ohio St. 113, 67 N.E. 282 (1903).

⁶² *Butt v. Green*, 29 Ohio St. 667 (1876).

⁶³ *Hoover v. Haslage*, 5 Ohio N.P. 90 (1907).

⁶⁴ *Butt v. Green*, 29 Ohio St. 667 (1876).

⁶⁵ *Ohio Loan Co. v. Kletecka*, 47 Ohio App. 514, 192 N.E. 182 (1934).

⁶⁶ OHIO REV. CODE §2329.72 (11729).

⁶⁷ OHIO REV. CODE §2329.73 (11730).

⁶⁸ *Genell v. Hirons*, 70 Ohio St. 309, 71 N.E. 709 (1904).

the property as a homestead. Being a possessory right, it does not constitute an assignable estate, nor does it run with the land.⁶⁹ Thus the exemption may be lost if the debtor conveys the property to another or ceases to occupy it as his homestead.⁷⁰

Because the statute exempts the homestead from sale only, and not from execution and attachment as in the case of chattel property, judgment liens may attach to the property.⁷¹ Such liens are not lost when the property is set off as a homestead, but as long as the property retains its identity as a homestead, no sale to enforce the lien will be permitted. When the property ceases to be used and occupied as a homestead, the inactive liens may then be enforced.

A. Persons Entitled to Homestead Exemption

1. A husband and wife living together are entitled to the homestead exemption, but neither will be allowed a homestead if one has already been demanded and set off to the other.⁷² Ownership of property by a husband and wife as tenants in common will not be construed as though the wife is the owner of a homestead so as to preclude her husband from claiming the right in the property against his creditors.⁷³ Whether a husband and wife are living together for the purposes of the exemption depends upon the facts existing at the time the property is seized and not when the judgment is rendered.⁷⁴ A temporary separation will not deprive them of the exemption as long as there has not been an abandonment of the homestead.

2. Every widow may claim the homestead exemption whether or not living with dependent children, but only in her own property.⁷⁵ A divorced woman is not considered a widow for the purposes of the exemption statutes.⁷⁶ A widow is also entitled to a homestead in the property of her deceased husband by virtue of a special statutory provision which grants the exemption in the event of a sale of his property by an executor or administrator to pay debts.⁷⁷ As long as she remains unmarried and resides in the property, it is exempt from sale under execution or order of court. This special privilege is also extended to an unmarried minor child of the decedent who remains in the property.

3. A widower living with an unmarried daughter or unmarried minor son is also entitled to the homestead exemption.⁷⁸ The exemption

⁶⁹ *Morgridge v. Converse*, 150 Ohio St. 239, 81 N.E. 2d 112 (1948); *Gledhill v. Walker*, 143 Ohio St. 381, 55 N.E. 2d 647 (1944).

⁷⁰ *McComb v. Thompson*, 42 Ohio St. 139 (1884).

⁷¹ *Ibid.*

⁷² OHIO REV. CODE §2329.73 (11730).

⁷³ *New Martinsville Grocery Co. v. Hannibal Store Co.*, 65 Ohio App. 50, 29 N.E. 2d 226 (1940).

⁷⁴ 20 O. JUR., HOMESTEADS 983.

⁷⁵ OHIO REV. CODE §2329.73 (11730).

⁷⁶ *Condon v. Condon*, 19 Ohio Op. 549, 33 Ohio L. Abs. 474 (1940).

⁷⁷ OHIO REV. CODE §2329.75 (11732).

⁷⁸ OHIO REV. CODE §2329.73 (11730).

will not be allowed to a widower who places his children in an orphanage even though he is contributing to their support, since he is not living with them as required by the statute.⁷⁹ Although earlier cases held otherwise, it is now settled that a divorced man is not a widower for the purposes of the exemption statutes.⁸⁰ While there is no express provision in the exemption statutes granting a homestead to a surviving husband in the lands of his deceased wife, the exemption has been allowed on the basis of a probate code section which provides for a homestead exemption to every surviving spouse.⁸¹ Since this provision, which antedates the exemption statutes, does not restrict the exemption to widows alone, the privilege has been extended by the courts to widowers as well.⁸²

Although the statute names only three groups of persons that are entitled to the homestead exemption, the right has been extended in a late case to every debtor with a family.⁸³ This decision is based on the wording of OHIO REV. CODE §2329.77 (11734) which describes the manner for setting off a homestead, and which provides that a homestead shall be granted on application of the debtor "if such debtor has a family." This tenuous construction of the statute indicates the extent to which some courts are prepared to go in extending the benefits of the exemption laws in a hardship case.

B. Property Constituting a Homestead

A homestead, as contemplated by the statute, is the real property in which the debtor and his family reside with the intention of making it their permanent residence.⁸⁴ A temporary or involuntary absence from the premises will not defeat the homestead as long as the family intends to return and has not established a permanent home elsewhere. To claim a homestead, the debtor must also own some interest in the property.⁸⁵ It is not essential that he hold title in fee simple; almost any lesser interest, including an equitable title, will suffice.⁸⁶ A homestead may also be granted in property occupied under lease, but need not be claimed to the exclusion of the exemption in lieu of homestead if the lease is for a short term.⁸⁷

The statute provides that the homestead shall be set off to the debtor by metes and bounds out of the lands about to be levied upon and

⁷⁹ *Ezra v. Sutton*, 16 Ohio L. Abs. 669 (1934).

⁸⁰ *Condon v. Condon*, 19 Ohio Op. 549, 33 Ohio L. Abs. 474 (1940); *Bentz v. Bentz*, 24 Ohio Op. 99, 8 Ohio Supp. 125 (1941).

⁸¹ OHIO REV. CODE §2127.26 (10510-30).

⁸² *Re Barnhisser*, 25 Ohio Op. 388 (1943); cf. *Geese v. Murphy*, 8 Ohio Op. 32, 24 Ohio L. Abs. 189 (1937).

⁸³ *Re Zerkle*, 68 Ohio App. 480, 42 N.E. 2d 204 (1941).

⁸⁴ *Mutual Bldg. & Invest. Co. v. Efros*, 152 Ohio St. 369, 89 N.E. 2d 648 (1949).

⁸⁵ *Re Talbott*, 14 Ohio F.D. 465 (1904).

⁸⁶ *Radford v. Kachman*, 27 Ohio App. 86, 160 N.E. 875 (1927).

⁸⁷ *Colwell v. Carper*, 15 Ohio St. 279 (1864).

shall not exceed \$1000 in value.⁸⁸ The remainder of the debtor's property is then amenable to sale on execution, although no further enforcement proceedings can be undertaken against the homestead as long as it is occupied as such. If the homestead consists of a house and lot which in the opinion of the appraisers will not bear division without manifest injury and inconvenience, a substitute arrangement is provided by the statute.⁸⁹ In such event, the creditor is entitled to receive the reasonable annual rental value of the homestead exceeding \$100 until his claim is paid in full. The debtor may remain in the property as long as he makes the payments, but in the event of a default the officer must sell the land and apply the proceeds to the payment of the debt.

C. Claims Not Subject to Homestead Exemption

1. There are five types of claims which by statute are made superior to the homestead exemption and exemption in lieu of homestead. A judgment rendered on a mortgage executed by the debtor and his wife is one of this group and takes precedence over the debtor's right to a homestead.⁹⁰ It is not the policy of the exemption statutes to allow a debtor to hold property against liens which he himself has created. But the debtor's wife or family are not precluded from claiming a homestead in mortgaged property unless the wife has joined in the mortgage.⁹¹ This limitation confers no new right upon the wife, but is merely intended to protect the family against the debtor's own weaknesses. So, if the mortgage is given by the husband alone before the right to a homestead attached to the property, the enforcement of the mortgage is not affected by the wife's failure to join in its execution.⁹²

2. Claims of less than \$100 for manual work or labor are superior to the debtor's homestead exemption.⁹³ The limitation of \$100 determines the nature of the claim coming within this exception, and does not merely refer to the maximum amount for which such claims may be enforced against the homestead. Thus a claim of this type in excess of \$100 does not fall within this group and cannot be asserted against the exemption for the amount allowed by the statute.⁹⁴

3. The lien by mortgage or otherwise of the vendor for the purchase money of the property is not impaired by the right of the purchaser to claim a homestead in the premises.⁹⁵

4. Liens granted mechanics and other persons by virtue of statute for materials furnished or labor performed in the erection of a dwelling-

⁸⁸ OHIO REV. CODE §2329.77 (11734).

⁸⁹ OHIO REV. CODE §2329.78 (11735).

⁹⁰ OHIO REV. CODE §2329.72 (11729).

⁹¹ OHIO REV. CODE §2329.82 (11739).

⁹² *Gibson v. Mundell*, 29 Ohio St. 523 (1876).

⁹³ OHIO REV. CODE §2329.72 (11729).

⁹⁴ 20 O. JUR., HOMESTEADS 999.

⁹⁵ OHIO REV. CODE §2329.72 (11729).

house on the homestead premises can be asserted free of the debtor's claim for a homestead.⁹⁶

5. The homestead exemption may not be claimed against an obligation for taxes owing upon the homestead property.⁹⁷

When a homestead is charged with liens some of which preclude the allowance of the homestead exemption, the statute provides that upon a sale of the property, the proceeds shall be applied first in payment of the liens superior to the exemption.⁹⁸ Out of the funds remaining, the next \$500 is paid to the debtor in lieu of his homestead exemption, and the balance, if any, to the unpreferred liens on the property. This provision is applicable even though the proceedings to sell the property are initiated to enforce a lien against which the homestead can be claimed.⁹⁹ The same procedure is authorized by the statute where the property of a decedent is sold by an administrator or executor to pay liens which are preferred by the statute.¹⁰⁰ After satisfaction of the liens, the decedent's widow or unmarried minor child receives \$500 from the proceeds of the sale in lieu of the homestead exemption they would otherwise have been entitled to.

D. Establishment and Loss of Right

The homestead exemption is not an absolute right, and must be demanded by the debtor before it will be set off to him under the statute. The exemption may be claimed at any time before the property is sold by making a demand upon the officer levying the writ of execution or by application to the court issuing the process under which the property is to be seized. The husband, or his agent or attorney, is the proper person to make the demand, but the wife may act in the event of his failure or refusal to claim the exemption.¹⁰¹

If either the debtor or his wife fails to demand the homestead in the proper manner and within the allowed time, the right will be considered waived.¹⁰² The exemption may also be lost if the debtor and his family cease to occupy the premises as their home. Abandonment of the homestead by the husband, however, will not affect the right of the wife and family to the exemption as long as they continue to reside in the property. But since the domicile of the family follows that of its head, the homestead will be lost if the debtor acquires a new residence which he intends to be the permanent family home. However, as with all exemptions, any executory promise, contract or agreement by which the

⁹⁶ *Ibid.*

⁹⁷ *Cowen v. Wassman*, 64 Ohio App. 84 (1939).

⁹⁸ OHIO REV. CODE §2329.80 (11737).

⁹⁹ *Aiken Loan Co. v. Mustaine*, 63 Ohio App. 227 (1939).

¹⁰⁰ OHIO REV. CODE §2329.76 (11733).

¹⁰¹ OHIO REV. CODE §2329.77 (11734).

¹⁰² *McComb v. Thompson*, 42 Ohio St. 139 (1884).

debtor attempts to waive the benefits of the homestead exemption is to that extent absolutely void under the statute.¹⁰³

IV. EXEMPTIONS IN LIEU OF HOMESTEAD

This third distinct type of exemption is available to certain debtors who are not the owners of a homestead, and is intended as a substitute for the benefits which accrue to the family through occupancy of the family dwelling.¹⁰⁴ The exemption applies to any real or personal property of the debtor selected by him to a value of \$500, and is in addition to the other exempt property to which he may be entitled under the exemption statutes. Once the property has been selected and set off to the debtor, he acquires absolute ownership in it with full power of disposition.¹⁰⁵ In this respect, the exemption of real property under this provision differs from the homestead exemption.

This exemption should not be confused with the alternative provisions under the homestead statute which provide for the payment to the debtor from the proceeds of the sale of a homestead when the property is subject to liens which prevent it from being set off in the usual manner. These provisions presuppose the debtor to be the owner of a homestead, and thus not eligible for the benefits of this exemption. Only when the proceeds from the sale of a homestead charged with liens is insufficient to allow the debtor the full \$500, is he permitted to claim the balance under the exemption in lieu of homestead.¹⁰⁶

Whether a debtor is the owner of a homestead in order to qualify for this exemption is determined by the factors discussed in the preceding section as they exist at the time the property is actually seized under an execution or order of sale.^{106a} The status of the debtor as one of the class entitled to this exemption is also determined as of the same time.¹⁰⁷

A. Persons Entitled to the Exemption in Lieu of Homestead

1. Husband and wife living together may claim the exemption in lieu of homestead if they are not the owners of a homestead.¹⁰⁸ The principles adopted by the courts in determining whether a husband and wife are entitled to the homestead exemption are, of course, applicable here. As with the homestead exemption, the wife is permitted to claim the exemption in lieu of homestead if the husband neglects or refuses to do so. The statutory provision granting to married women all the exemptions allowed the head of a family has been construed to include the exemption in lieu of homestead as well.¹⁰⁹ This privilege applies,

¹⁰³ OHIO REV. CODE §2329.72 (11729).

¹⁰⁴ OHIO REV. CODE §2329.81 (11738).

¹⁰⁵ *Gledhill v. Walker*, 143 Ohio St. 381, 55 N.E. 2d 647 (1944).

¹⁰⁶ 20 O. JUR., HOMESTEADS 1057.

^{106a} *Rodler v. Trovillo*, 11 Ohio Op. 512, 26 Ohio L. Abs. 556 (1938).

¹⁰⁷ *Sweigart v. Sweigart*, 33 Ohio L. Abs. 250, 35 N.E. 2d 578 (1940).

¹⁰⁸ OHIO REV. CODE §2329.81 (11738).

¹⁰⁹ *Home Banking Co. v. Huffman*, 1 Ohio N.P. (N.S.) 349 (1903).

however, only to the property owned by a married woman in her own right, and does not enlarge her exemption rights in her husband's property.

2. A widow who is not the owner of a homestead is entitled to this exemption.¹¹⁰ This right extends only to the separate property of the widow, and does not permit her to hold exempt any of the property owned by her husband during his lifetime, nor to claim the exemption against judgments asserted against his estate.¹¹¹ The cases dealing with those who are considered widows for the purposes of the exemption laws have been discussed in connection with the homestead exemption.

3. A widower living with an unmarried daughter or unmarried minor son, and not the owner of a homestead, is eligible for the exemption in lieu of homestead.¹¹² This classification of persons has been treated in the preceding section.

4. Every unmarried female having in good faith the care, maintenance and custody of a minor child of a deceased relative, who is a resident of this state and not the owner of a homestead, is entitled to the exemption in lieu thereof.¹¹³ Except for this additional class of persons, the exemption in lieu of homestead is granted to the same persons who would be entitled to the homestead exemption if the owners of a dwelling. Although the benefits of this exemption were extended in an early case to a divorced woman having the care and custody of her minor children,¹¹⁴ this holding has been abrogated in a more recent decision in which the court held that under such circumstances the children being cared for are not those of a deceased relative as required by statute, and that meaning must be ascribed to every phrase of the exemption statute.¹¹⁵

B. Property Exempt in Lieu of Homestead

The statute provides that a debtor may hold exempt in lieu of homestead real or personal property to be selected by him not exceeding \$500 in value.¹¹⁶ As indicated earlier, the property exempted under this provision is in addition to the personal property to which the debtor may be entitled under OHIO REV. CODE §2329.66 (11725). Any of the debtor's property may be claimed under this exemption other than money, salary or wages due to him from any person, partnership or corporation, and passenger automobiles, which are specifically excepted by the statute.¹¹⁷ Cash in the possession of the debtor, however, can be claimed exempt.

The restriction against selecting money, salary or wages is not limited to the debtor's personal earnings for labor or services performed,

¹¹⁰ OHIO REV. CODE §2329.81 (11738).

¹¹¹ *Dillman v. Warner*, 54 Ohio App. 170 (1935).

¹¹² OHIO REV. CODE §2329.81 (11738).

¹¹³ *Ibid.*

¹¹⁴ *Re Giles*, 6 Ohio L. R. 173 (1908).

¹¹⁵ *Condon v. Condon*, 19 Ohio Op. 549, 33 Ohio L. Abs. 474 (1940).

¹¹⁶ OHIO REV. CODE §2329.81 (11738).

¹¹⁷ *Ibid.*

but includes funds due him from every source.¹¹⁸ Thus, money on deposit in a bank is not exempt for the relation of debtor and creditor exists between the bank and the depositor.¹¹⁹ But this reasoning is not applied except where the relation of debtor and creditor has been created by voluntary contract. When property which might have been claimed exempt has been destroyed by fire, the insurance proceeds due the debtor for the loss may be selected as exempt in lieu of homestead.¹²⁰

Much of the litigation arising in connection with this exemption deals with the interpretation of the terms "person" and "corporation" from whom money due may not be selected as exempt. It is now well settled that "person" includes an administrator or executor, and that money in the hands of such fiduciary ready for payment to a legatee pursuant to an order of distribution is not exempt.¹²¹ Before an order of distribution is made, however, the funds are exempt since they are in *custodia legis* and the fiduciary holds them as an officer of the court rather than as a "person" under the statute.¹²² A sovereign government is not a "corporation" for the purposes of the statute, and obligations of the United States in the nature of bonds are not money due from a corporation and may be selected under the exemption.¹²³ Similarly, a dividend check issued to a debtor under his National Service Life Insurance may also be exempt.¹²⁴

The statute also prohibits the selection of a passenger automobile as exempt property in lieu of homestead.¹²⁵ The term does not refer to the physical attributes of the vehicle but to the uses to which it is devoted. If used by the debtor principally in the conduct of his business and if essential for that purpose, its identity as a passenger automobile will not prevent the exemption. A passenger automobile required by a travelling salesman for the performance of his work has been set off as exempt property under this provision.¹²⁶

The statute contemplates that the exemption shall be allowed out of specific items of property. An arrangement to pay the debtor the sum of \$500 in cash from the proceeds of the sale of property which has been seized and which might be claimed exempt may not be equitable to creditors since the property may sell for less than its appraised value. If

¹¹⁸ *Morris Plan Bank v. Viona*, 122 Ohio St. 28, 170 N. E. 650 (1930).

¹¹⁹ *Ibid.*

¹²⁰ *Dennis v. Smith*, 125 Ohio St. 120, 180 N.E. 638 (1932).

¹²¹ *City Loan & Svgs. v. Guthridge*, 61 Ohio App. 202 (1938); *Caton v. Kohler*, 69 Ohio App. 455 (1941).

¹²² *Orlopp v. Schueller*, 72 Ohio St. 41 (1905).

¹²³ *Troutman v. Eichar*, 64 Ohio App. 415, 28 N.E. 2d 953 (1940).

¹²⁴ *Re Walker*, 43 Ohio Op. 379 (1950).

¹²⁵ OHIO REV. CODE §2329.81 (11738).

¹²⁶ *Matter of Antle*, 11 Am. Bank. Rep. (N.S.) 127 (1927). But a passenger automobile of an optometrist not essential in the conduct of his business was held not exempt in *Re Temple*, 20 F. Supp. 593 (1936).

the debtor requests that all the property levied upon be sold, he should bear a fair share of the cost of the sale, and absorb a proportionate share of the loss if the property brings less than the amount for which it was appraised.¹²⁷

C. Claims Not Subject to Exemption in Lieu of Homestead

The five specific classes of claims enumerated by the statute against the enforcement of which a debtor may not claim the homestead exemption or exemption in lieu of homestead have been discussed in the preceding section. The provision granting the exemption in lieu of homestead, however, describes an additional type of claim against which this exemption may not be asserted.¹²⁸ It provides that no personal property shall be selected as exempt from execution on a judgment rendered for the purchase price or any part thereof. For the purposes of the exemption in lieu of homestead, the unsecured vendor of personal property is given the same privileged status as the vendor whose claims for the purchase price of realty is secured by mortgage or other lien. But in order for an unpaid seller to take advantage of this preferred position, his claim must be solely for the purchase price or a part thereof. If he combines his claim for the purchase money with a claim for merchandise sold and delivered on open account, he waives his right under this provision of the statute.¹²⁹

D. Establishment and Loss of Right.

The manner in which the right to the exemption in lieu of homestead must be exercised and the circumstances under which its benefits may be lost are determined generally by the same principles pertaining to the exemptions of specific personal property which have been discussed in connection with that subject. It will suffice here to note that once the debtor has selected and had set off to him the property exempt in lieu of homestead, he may, notwithstanding the first allowance, continue to claim the exemption at any time in the future. The right may be re-asserted against the same judgment and out of the same property, or if that has been consumed, out of other property, subject only to the limitation that the value of the property claimed by the debtor at any one time may not exceed the statutory allowance.¹³⁰

V. CONCLUSION

This general review of the Ohio exemption laws indicates the extent of the protection afforded debtors today in the enforcement or collection process. Unfortunately, this protection is no longer sufficiently effective in most cases to accomplish the purposes for which the exemption statutes were originally enacted. The inadequacy of the statutes is not in the scope of their application, but in their restrictions upon the amount of

¹²⁷ 20 O. JUR., HOMESTEADS 1059.

¹²⁸ OHIO REV. CODE §2329.81 (11738).

¹²⁹ State ex rel. Coles v. Shook, 97 Ohio St. 164, 118 N. E. 1010 (1918).

¹³⁰ Sweigart v. Sweigart, 33 Ohio L. Abs. 250, 35 N.E. 2d 578 (1940).

property which a debtor is permitted to retain for his family. The limitations of value upon many of the items exempted are neither realistic nor practical in our present economy. This is especially true of the homestead exemption where the maximum value of \$1000 upon the land and buildings which may be exempt has prevailed without change since 1869. If the benevolent objects of the exemption statutes are to be fully realized, the benefits available must be increased by the legislature. At such time, perhaps some measure of uniformity can also be achieved in the terminology of the various statutes, thus eliminating several areas of doubt and confusion.